IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

VICKY MANN,
Plaintiff

V. NO. 1:93CV107-B-D

CITY OF TUPELO, TUPELO-LEE HUMANE SOCIETY, SUNSHINE MILLS, INC., AND SUZIE O'NEAL,
Defendant

ORDER

This cause comes before the court on the plaintiff's motion to reconsider and alter judgment pursuant to Rule 52(b) of the Federal Rules of Civil Procedure. Since Rule 52(b) applies to judgments rendered in "actions tried upon the facts without a jury or with an advisory jury," and the previous judgment which the plaintiffs ask for reconsideration on is a summary judgment, the court will construe the motion under Rule 59(e), which is appropriate for reconsideration of summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

The court finds that the plaintiff's motion to reconsider the order striking the three statements submitted in opposition to the defendants' motions for summary judgment is well taken. The dated and subscribed statements substantially comply with the form set forth in 28 U.S.C. § 1746. Section 1746 reads in pertinent part:

> Wherever, under any law of the United States or under any rule...any matter is required or permitted to be supported, evidenced,

> established, or proved by...affidavit,...such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated....

In accordance with section 1746, "unsworn declarations, subscribed by the declarant as true under penalty of perjury, may be substituted for affidavits." Carney v. United States Dep't of Justice, 19 F.3d 807, 812 n.1 (2d Cir.), cert. denied, 130 L. Ed. 2d 38 (1994). See Knight v. United States, 845 F. Supp. 1372, 1374-75 (D. Ariz. 1993) (dated declaration made under penalty of perjury in support of a summary judgment motion met the requirements of Rule 56(e) of the Federal Rules of Civil Procedure). The court reconsiders the statements in dispute as adequate substitutes for affidavits. Therefore, the ruling striking the statements is DELETED from the order issued on April 11, 1995.

As noted in the previous memorandum opinion, the statements refer to TV reports and an alleged statement of Sunshine Mills. The court finds that the statements in dispute are of no consequence since the TV station is not a defendant and the court has scrutinized the transcripts and video of the pertinent TV newscasts. The statements do not raise a genuine issue of material fact as to the defamation claims against any of the defendants. Accordingly, the motion to alter the summary judgment on the

defamation claims is DENIED.

As further grounds in support of the instant motion, the plaintiff asserts that newly discovered evidence establishes a "for cause" standard for the discharge of City employees. The affidavit of the plaintiff's counsel states in part:

> It had recently come to my attention that the City had amended its handbook and had put specific "at will" language into the handbook. I had also been made generally aware of discontent among City employees with this alteration of the handbook.

Counsel's affidavit and supplemental affidavit refer to a letter from the City's chief operations officer, Joe Benefield, to City employees regarding the new handbook. The letter states in pertinent part:

> The employment-at-will language contained in the acknowledgement form must remain within the text of the form and remains the law in the State of Mississippi....As a general policy, the City of Tupelo does not terminate employees without what it deems to be an appropriate reason.

The plaintiff states that she and her counsel had no way of discovering Benefield's letter during the summary judgment proceedings. However, the plaintiff admits that her counsel was previously aware that the City had amended its handbook.

Benefield's letter is not dated and the plaintiff does not assert that the letter was distributed to employees during the plaintiff's period of employment or that the letter pertained to the handbook in effect during the plaintiff's employment. On the

contrary, the plaintiff suggests that the handbook was amended after the filing of this action: "[T]he City has changed the wording in its handbook in an apparent attempt to avoid lawsuits like the instant one." The court finds that the newly presented evidence, in the absence of any showing of its applicability to the relevant period, is not properly before the court and cannot raise a genuine issue of material fact as to the plaintiff's employment status at the time of her separation. Even assuming arguendo that the letter pertains to the City's policy during the plaintiff's employment, it would not alter the plaintiff's at will status. Benefield's statement that, generally, the City "does not terminate employees without what it deems to be an appropriate reason," does not repudiate the employer's right to discharge an employee without cause preserved in the express at will language in the acknowledgment form, as well as in the new handbook (emphasis added). See Hartle v. Packard Elec., 626 So. 2d 106, 109-10 (Miss. 1993) (handbook's list of reasons for discharge did not limit the employer's discretion to discharge without cause). Therefore, the motion to amend the summary judgment ruling on the plaintiff's employment-related claims is DENIED.

THIS, the _____ day of June, 1995.

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NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE